



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: A & H Automotive Industries, Inc.
File: B-225775
Date: May 28, 1987

DIGEST

1. Protest that agency improperly rejected protester's proposal for failing to designate a domestic forging source in its proposal is denied where the solicitation required domestic forgings and protester designated a foreign forging source and the protester failed to revise its proposal after the agency advised the protester during oral discussions, that its proposal specifying a foreign source was unacceptable.

2. Protest not filed until after the next closing date for receipt of revised proposals where alleged ambiguity in solicitation was introduced during discussions is untimely under 4 C.F.R. § 21.2(a)(1) (1986).

DECISION

A & H Automotive Industries, Inc., protests the rejection of its proposal and the award of a contract for countershafts to Diverco, Inc., under request for proposals (RFP) No. DLA700-86-R-1247, issued by the Defense Logistics Agency (DLA). Countershafts are motor vehicle parts. We deny the protest in part and dismiss it in part.

Award of this requirements-type contract was made on the basis of the low acceptable offer. Since the countershafts are forged items, DLA incorporated into the solicitation clause I-81, entitled "Required Sources for Forging Items," as set forth in the Department of Defense Supplement to the Federal Acquisition Regulation (DFAR), 48 C.F.R. § 52.208-7005 (1985). The clause provides in pertinent part:

"The contractor agrees that end items, components and processed materials thereof delivered under this contract shall contain domestic forging items of United States and Canadian manufacturers
. . . ."

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DLA rejected A & H's low offer for failure to comply with this provision.

In its original offer, A & H specified its place of manufacture and source of supply for the items as Metalcastello, Italy. By letter of July 14, 1986, A & H amended its offer specifying the United Kingdom in place of Italy.

DLA states that on October 20, in oral discussions with A & H, the agency advised A & H that its proposal specifying the United Kingdom as its supply source/ manufacturer was unacceptable since clause I-81 required domestic forged items. Following these discussions, A & H advised DLA by letter of October 28, that:

"Because of the inclusion of Clause I-81-Required Sources for Forging, we are exploring the option of using domestic or Canadian forging for this item. We will advise you within the next 7-10 days if we are able to comply at the quoted price."

DLA states that on November 6, the offerors, including A & H, were orally notified that an amendment would be issued requesting best and final offers (BAFOs). At this time, according to DLA, A & H advised the agency that the firm had located a domestic source.^{1/} DLA states that A & H was advised at that time to specify in its BAFO its domestic source. The amendment requesting BAFOs was issued on November 19, and established a closing date of December 1. DLA states that since A & H subsequently failed to revise its proposal with regard to its supply source, the firm's proposal specifying the United Kingdom as its supply source was rejected.

A & H argues that its proposal was improperly rejected since clause I-81 merely requires the contractor to "agree" to use domestic forging and because A & H orally agreed to this, it should not have been rejected for failing to include the name of its domestic forging source in its proposal. A & H contends that it complied with clause I-81 when it orally advised the contracting activity prior to the closing date for BAFOs that it agreed to use a domestic forging source and subsequently acknowledged the amendment requesting BAFOs without taking exception to the domestic

^{1/} A & H claims that on November 19, it orally advised DLA that it had located a domestic source. This factual dispute as to when A & H advised DLA that it had located a domestic source is not material to the resolution of this protest.

forging requirement. In this regard, A & H maintains that since DLA decided to enforce clause I-81 requiring the domestic forging (the clause allows for waiver when it is determined to be within the governments best interest), the firm's designation of a forging source was merely a matter of information because all offerors were required to use domestic forging. Thus, A & H maintains that its failure to include a domestic source in its proposal "in no way affected its obligation to provide domestic forging" and that its failure to provide this information should be considered a minor informality and waived.

The protester also contends that the provisions of clause I-81 do not require the offeror to notify the contracting officer of its domestic source as a precondition to award and that the clause merely requires the successful contractor to furnish such information upon demand by the contracting officer. In support of its contention, A & H points out that paragraph (e) of clause I-81 provides that "the contractor agrees to retain until the expiration of 3 years from the date of final payment under this contract and make available during this period, upon request of the contracting officer, records showing compliance with this clause."

DLA responds that during oral discussions, A & H was advised that its proposal specifying a foreign supply source was unacceptable and that A & H was given an ample opportunity to revise its proposal correcting this deficiency. In this regard, DLA points out that the solicitation clearly requires offerors to identify their supply source/place of manufacture and warns that the failure to provide such information could preclude the consideration of an offeror. Also, DLA advises that the protester was advised on two different occasions that it must designate a domestic supply source to be considered acceptable. The agency concludes that since A & H failed to revise its proposal to show compliance with this requirement, the firm's proposal was properly rejected.

We agree with DLA. While clause I-81 requires the contractor to "agree" to use domestic forging, the solicitation specifically required offerors to identify their supply source/place of manufacture for these items. Based on the proposals, the agency reasonably determined that A & H's proposal did not offer domestic forging. Since A & H's proposal provides that its supply source/place of manufacture is the United Kingdom, it conflicts with the requirement for domestic forging. Because A & H did not revise its proposal designating a foreign source after being notified of this discrepancy in its offer, the agency acted

reasonably in rejecting the proposal. See Penthouse Manufacturing Co., Inc., B-217480, Apr. 30, 1985, 85-1 C.P.D. ¶ 487 and 49 Comp. Gen. 606 (1970).

While A & H argues that it is obligated to provide domestic forging because it orally agreed to do so, the protester's mere oral agreement to provide domestic forging is unacceptable where, as here, the solicitation requires offerors to specify their sources for these items and warns that failure to do so could result in proposal rejection. In any event, the solicitation incorporated the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.215-9 which provides that proposal modifications must be submitted in a written form. See Gregory A. Robertson, B-213351, June 5, 1984, 84-1 C.P.D. ¶ 592; Plant Facilities and Engineering, Inc., B-210618, Apr. 22, 1981, 81-1 ¶ 310.

A & H disputes that it was told by DLA to revise its proposal to show compliance with the domestic forging requirement. The firm argues that even if such an oral request for domestic source information was made, non-compliance with a mere oral request is not grounds for proposal rejection; A & H argues that if DLA required A & H to revise its proposal to designate a domestic source, DLA should have advised the firm of this in writing.

However, a procuring agency is not required to hold written negotiations to advise offerors of proposal deficiencies. FAR, 48 C.F.R. § 15.610(b), specifically provides that such negotiations may be either in written or oral form. Moreover, the record shows, and A & H does not refute, that in oral discussions with A & H, DLA advised the firm that its proposal was not acceptable because it designated a foreign supply source. Indeed, it is clear that A & H understood its proposal to be defective for failure to meet the domestic forging requirement since following these discussions the firm wrote to the agency that "because of the inclusion of clause I-81--Required Sources for Forging--we are exploring the option of using domestic forging"

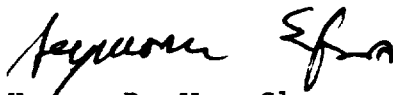
The record shows that all offerors, including A & H, were given the opportunity to submit a BAFO to correct any errors in their proposals or address concerns raised by the agency in discussions. DLA clearly advised A & H why its offer was deficient and gave it the opportunity to correct the deficiency. Thus, DLA met its obligation to conduct meaningful discussions. See ATI Industries, B-215933, Nov. 19, 1984, 84-2 C.P.D. ¶ 540. Where, as here, an agency has identified those areas in a proposal which are deficient and has afforded the offeror an opportunity to correct these deficiencies in a revised proposal, the offeror bears the burden of furnishing a satisfactory revised proposal addressing the

concerns raised by the agency. Thus, it was A & H's responsibility to submit an adequately written revised proposal after learning that its written proposal was considered unacceptable because it designated a foreign supply source. See ATI Industries, B-215933, supra.

In its April 22, 1987, comments submitted in response to the DLA report on the protest, A & H argues that the solicitation is ambiguous because it requires offerors to furnish product source information under the Buy American Act, 41 U.S.C. §§ 10a-10d (1982), which permits any contractor to compete for a given procurement regardless of the origin or place of manufacture of the product offered, when, in fact, clause I-81 does not allow for sources other than domestic sources.

This basis for protest is untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986), alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated must be protested not later than the next closing date for receipt of proposals. Here, at the latest, in oral discussions conducted on October 20, the agency advised A & H that domestic forging were required under this solicitation. Thus, if A & H believed that this interpretation of the RFP was in conflict with any other solicitation provision, it should have protested this matter prior to the next closing date, December 1.

The protest is denied in part and dismissed in part.

for 
Harry R. Van Cleve
General Counsel